

BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF

C. G.,

PETITIONER,

vs.

METRO DAVIDSON COUNTY
SCHOOL SYSTEM,

RESPONDENT.

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No. 98-12

OPINION

BACKGROUND FACTS

This matter was heard on the May 14th, and 15th, 1998 before the Honorable Richard H. Walker Administrative Law Judge for the State of Tennessee. The child in question is 6 years of age and has been diagnosed with Downs Syndrome. She is currently receiving special education and related services through Metropolitan Nashville Public Schools and attends J. E. Moss Elementary School. This child is mentally retarded and speech impaired.

Before coming to Tennessee the child received services in the State of Texas. During the 1996-97 school year the child began to receive services in the Metro school system. Last summer the child was enrolled in the Donelson Hermitage Y.M.C.A.

summer fun program. For the 1997-98 school year this child was placed in the Kindergarten inclusion program and received 8 hours per week in the special education classroom and 27 hours per week in the regular classroom. This child also had a full time assistant and received speech language services and occupational therapy.

The school systems multi-disciplinary team met and determined that the child should be receiving extended school year services for the summer of 1998. The summer services were to include 3 hours per week with the special education teacher, 6 sessions of .5 hours per week of occupational therapy and 1 hour of speech/language therapy per week.

The Petitioner brought this due process action on behalf the minor child contending the child is not receiving a free appropriate public education.

ISSUE 1

Whether or not an expert witness may testify by phone without being physically present at trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUE 1

The question arises in this case as to whether or not the physical appearance of an expert witness is required and when the witness is not present should the testimony be admitted into evidence. The Petitioner called Denise Bryant a Speech/Language Pathologist for Vanderbilt University Medical Center as an expert witness. The school system objected on the ground that the witness could not testify without a physical appearance. This Court has not received a post-trial brief from either party on this issue nor is the Court familiar with any case on point.

Pursuant to the scheduling Order that this Court mailed to all parties each party was to provide a list of witnesses to the Court and to the opposing party. The Petitioner did provide to the Respondent a witness list that included this witness. Furthermore, there was a request that the witness testify by phone. There was no written objection by the Respondent although the Respondent did object at trial.

The Tennessee Rules of Civil Procedure Rule 31 provides that “any party may request depositions upon written questions” of any witness without the physical appearance of the witness at the trial. The “opposing party may also submit written questions” to the witness within the time prescribed by the rule. Rule 32.01 (3)(E) sets out the standards for deposition use and witness attendance. That rule states as follows:

“upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.”

It is clear that a party may secure testimony of a witness to be submitted at trial without a physical appearance although reasons must exist that the witness is unable to attend. Rule 1 describes the scope of the Tennessee Rules of Civil Procedure which is to secure a just, speedy and inexpensive determination of every action. Furthermore, these actions must be heard within a very short time frame. This Court can see little difference between securing testimony in written or oral form without the presence of the witness. Rule 32 also clearly makes use of depositions at trial when justice requires and certainly the witness was unable to attend. Therefore, the testimony is admitted.

ISSUE 2

Whether this child is receiving a free appropriate public education through her individualized educational program or through the implementation of the program.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUE 2

The parent first contends that during the regular school year the Individualized Educational Program (IEP) for this child was not being properly implemented by the school system. The burden of proof is on the Petitioner to show by the preponderance of the evidence that the child is not receiving a free appropriate public education.

Clearly, from the record, the IEP was specific as to the services to be provided to the child and there is no proof that the school system failed to properly implement the necessary services for the regular school year. Therefore, on this issue the Court can find no merit to the parent's claim.

The second part of this issue concerns the extended school year. Any extended school year service must be an appropriate educational experience for the handicapped child's situation. See Johnson v Independent School District No. 4 of Bixby, Tulsa County, OK, 921 F. 2d 1022, 1030 (10th Cir. OK 1990). There is no dispute that the child is entitled to special education and related services during the summer or extended school year that is appropriate for the child. The M-Team met and determined the number of hours and services for the child over the summer. The parents disagreed with the summer program proposed and brought this Due Process hearing. The issue is therefore whether the services proposed by the school system for the extended school year 1998 are appropriate.

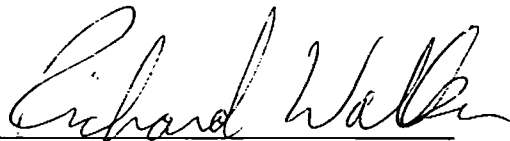
The parent contends that the Individualized Educational Program (IEP) is not appropriate for the extended school year because the child is not to be enrolled in the

Y.M.C.A. Summer Fun Program as last summer. From Volume 2 of the trial transcript the Court relies on the testimony of Carol Garrett pages 335-338. Ms. Garrett works in the inclusion program with this particular child. She testified that the child needed more time this summer with the special education teacher and less time in a large group because of difficulties the child was experiencing. It is apparent that her reasoning was to obtain more appropriate behavior by the child while minimizing oppositional behaviors. Ms. Garrett further testified that the child did have difficulties in the summer program last year. On page 339 of the same transcript she indicates that the purpose of the change from last year's IEP was to decrease the child's frustration level with the program.

The weight of evidence in the present case certainly indicates that the child is receiving educational benefit and has not been denied a free appropriate public education and therefore the parents claim must be denied.

SUMMARY

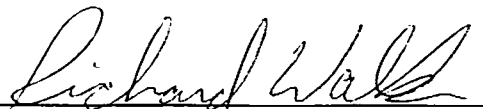
The Court finds that the Respondent is the prevailing party in this matter and that the child was not denied a free appropriate public education and the testimony of the witness, Denise Bryant, M.A., is admitted.



Richard H. Walker

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this foregoing document has been sent by postage prepaid mail this the 10th day of June, 1998, to the School System and the Child, through counsel, if any, directly if not.



RICHARD H. WALKER

Notice

Any party aggrieved by this decision may appeal to the Chancery Court of Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of this Opinion.